84-1070

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

A blind student who was medically eligible for vocational rehabilitation funds was denied assistance by the Washington State Commission for the Blind on the sole grounds that his vocational objective was to be a pastor, missionary, or Christian education director.

1. Does the Establishment Clause of the First Amendment prohibit a blind student who is studying for the ministry from participation in a federal and state funded vocational rehabilitation program for which he is statutorily and medically eligible?

2. Did the Supreme Court of Washington

State err by applying the "tri-partite" Establishment Clause test to a single, blind student rather than examining the entire statutory program?

3. Did the Supreme Court of Washington State's interpretation of the Establishment Clause actually result in a violation of the Free Exercise Clause of the First Amendment by denying participation in a vocational rehabilitation program to a blind student for the sole reason that his vocational objective was to be a minister, missionary, or Christian education director?

PARTIES

All parties are listed in the caption.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of

Washington entered in this proceeding on October 4, 1984.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, which appears as Appendix A hereto, is reported at 102 Wn. 2d 625, 689 P.2d 53 (1984). The dissenting opinion in that court appears as Appendix B. The oral opinion of the Superior Court of Spokane County, Washington, the Honorable Marcus M. Kelly, made on December 11, 1981, which appears as Appendix D hereto, is unreported. The Findings of Fact and Conclusions of Law entered on May 26, 1982, in said Superior Court appear as Appendix C.

Two written decisions were entered by the Office of Hearings of the State

of Washington, Department of Social and Health Services. The initial decision was entered on October 28, 1980 by Paul B. Hutton, Hearings Examiner. This decision is attached as Appendix F. This decision was affirmed on administrative review on December 3, 1980 by Monty Foster, Review Examiner. This decision is attached as Appendix E.

JURISDICTION

This case was decided and judgment was entered by the Supreme Court of the State of Washington on October 4, 1984. The jurisdiction of this Court is invoked under Title 28 of the United States Code Sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make no law respecting

an establishment of religion, or prohibiting the free exercise thereof. . . ."

U.S. Constitution, Amendment XIV:

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Code of Washington 74.16.181:

"The commission may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care. Services provided for under this section may be furnished to clients from other agencies of this or other states for a fee which shall not be less than the actual costs of such services. Under such program the commission may: ...

(3) Provide for special education and/or training in the professions, business or trades under a vocational rehabilitation plan, and if the same cannot be obtained within the state, provisions shall be made for such purposes outside of the state. Living maintenance during the period of such education and/or training within or without the state may be furnished."

STATEMENT OF THE CASE

Petitioner, Larry Witters, instituted this action as an appeal from an administrative decision which denied funding by the Washington State Commission for the Blind for his vocational rehabilitation program. This matter has proceeded on stipulated facts throughout all stages.

Witters was a student at Inland Empire School of the Bible in Spokane, Washington. He was medically and statutorily eligible for participation in the vocational rehabilitation program administered by the Washington State Commission for the Blind.

This program was funded approximately eighty percent by federal funds and twenty percent by state funds.

Larry Witters was training to become a pastor, missionary, or Christian

youth director. His program was originally exclusively at Inland Empire, but later changed to a combined program with Whitworth College, a private, accredited Presbyterian College. This program results in a degree in Biblical studies from Inland Empire and a Bachelor of Arts from Whitworth College. His course of study included courses in Old and New Testament studies, ethics, speech, and church administration.

Inland Empire School of the Bible is a nondenominational Christian college offering various programs in Christian education including the three year degree in Biblical studies and the Bachelor's degree in cooperation with Whitworth College. Inland Empire School of the Bible is a private religious institution supported by private donations, tuition, and fees.

The procedural history of Larry Witters' efforts to obtain funding is remarkable in that the state agency has, in effect, challenged the constitutionality of its own statute as applied to Petitioner.

The statutory program provides aid to all medically eligible blind persons in need of vocational rehabilitation. There is no statutory exclusion of those studying for the ministry. When Witters applied for assistance, he was denied assistance by the Commission for the Blind solely because he wanted to be a minister.

After Witters applied for aid, the Commission subsequently adopted the following policy statement:

> Private institutions or out-of-state institutions: The Washington State Constitution forbids the use of

> public funds to assist an individual in the pursuit of a career or degree in theology or related areas.

These state constitutional sections forbid the use of public funding of religious schools. See, Washington Constitution, Art. IX Sec. 4, Art. I Sec. 11. However, others attending religious schools were funded under this program if their occupational objective was something other than training for the ministry. The sole reason for the disqualification of Larry Witters was his goal to be a minister, not the fact that his college was religious in nature.

An administrative review of the Commission's decision resulted in a reaffirmation of the initial denial of assistance. This decision was affirmed by the initial hearings examiner

in the administrative process on October 28, 1980. This examiner acknowledged that Witters raised federal constitutional questions in written memorandum but "dismisse[d] Appellant's U.S. Constitutional arguments since he does not have the authority or jurisdiction to hear and decide such cases." See Appendix F at 6.

Upon internal administrative review, the review examiner gave more consideration, but once again rejected Witters' federal constitutional claims which had been raised in the written memorandum of authorities. The review examiner noted:

> The Appellant finally urges that even if the state constitution is construed to deny aid, such denial violates the 14th Amendment and it also violates the First Amendment's guarantee of free exercise of religion. The Appellant's arguments

> concerning the 14th Amendment of the United States Constitution are discussed above [See Appendix E at 4] and will not be further discussed here. The First Amendment to the United States Constitution guarantees free exercise of religion. It does not require that the state subsidize religious study.
>
> ---Appendix E at 7-8.

An appeal was taken to the Spokane County Superior Court pursuant to the Washington Administrative Procedure Act. The Superior Court upheld the Commission's denial of funds based upon the provisions of the Washington State Constitution which prohibit aid to religious schools.

Witters again raised free exercise and equal protection claims under the United States Constitution in the Superior Court by way of trial brief and oral argument. The Superior Court rejected, albeit somewhat reluc-

tantly, Petitioner's federal constitutional arguments. The trial judge said:

> Mr. Farris, you have raised some intriguing arguments that have given this Court fits, for want of a better term. The area that gives me the most concern in this case, is I do not see any conflict between what is done here and either the First Amendment of the United States Constitution, the establishment clause, the practice [free exercise] clause. The area that gives me concern is the equal protection. That gives this Court some concern.
>
> --Appendix D at 31-32.

An appeal was taken to the Washington State Court of Appeals, which then certified the issue to the State Supreme Court because of the importance of the issues.

At both the trial court level and on appeal, the Petitioner took the position that the State Constitution, properly construed, did not prohibit

his participation in this program, but if the State Constitution did mandate his exclusion, the State Constitution was in violation of the Federal Constitution's Free Exercise and Equal Protection Clauses.

At no point in the procedure did the counsel for the Commission for the Blind take the position that granting aid was prohibited by the First Amendment's Establishment Clause.

Faced with federal constitutional challenges to the State Constitutional provisions, on October 4, 1984, the Washington State Supreme Court ruled, in a seven-to-two vote, that the Establishment Clause of the First Amendment of the United States Constitution prohibited aid to Larry Witters because he wanted to be trained to be a minister. Because of this ruling, the State

Supreme Court did not reach a decision on the state constitutional issues.

The Washington Court focused on the "second prong" of the Establishment Clause test and ruled that permitting Larry Witters to participate in this vocational rehabilitation program would have the "primary effect" of advancing religion since his goal was to be a minister.

The majority considered and rejected Witters' free exercise and equal protection arguments in light of its ruling that the Establishment Clause prohibited government aid for his studies. "We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution." Appendix A at 16. "This precludes any need to determine whether the denial of

aid on state constitutional grounds would violate the equal protection clause of the Fourteenth Amendment." Appendix A at 17.

In effect, the State Commission for the Blind has taken the position that its own statute is unconstitutional as applied to Larry Witters. Petitioner has taken the position throughout that the funding program which is open to all medically eligible persons is constitutional, but to deny him aid violates both the Free Exercise and Equal Protection Clauses of the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. The Case Presents Important Questions of Constitutional Law Not Yet Settled by This Court.

There are three aspects of this case which present novel and important issues concerning the Establishment Clause of the First Amendment, two of which appear to be absolutely of first impression in this Court.

1. This Court has never considered the issue of the constitutionality of government funded education or vocational training programs which are used by an individual to obtain training for the ministry.

Although programs such as the GI Bill have permitted individuals to be trained for the ministry for several decades, this appears to be a case of absolute first impression

in not only in this Court, but in any court. If this case is permitted to stand, it creates a precedent that would threaten neutral programs such as the GI Bill and other programs of vocational rehabilitation if an individual recipient uses his funds to be trained for the ministry.

The Washington State legislature failed to see any necessity to exclude those studying for the ministry from the statutory program to aid blind people. The legislature considered the program to aid blind people to be trained for work. Obviously, Larry Witters would be trained for a career which has a long standing history of providing jobs for trained individuals. It appears that Washington State stands alone in excluding ministerial students from state-directed vocational rehabilita-

tion programs. The policy statement directing this exclusion was made after this controversy arose. No comparable federal policy or policy from other states has been found which excludes ministerial students from neutral government programs of vocational rehabilitation.

We would respectfully suggest that Washington's unique position on this issue points only to its unconstitutionality.

2. It would appear that the reason that such programs have not been challenged heretofore is that individual recipients of programs such as the GI Bill do not usually get singled out for constitutional examination as was done to Larry Witters. The examination of a single, individual recipient for Establishment Clause

purposes raises important and novel constitutional questions.

The Supreme Court of the State of Washington, used the Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 45 (1971), "tri-partite" test, not to examine the constitutionality of the entire program of vocational rehabilitation for the blind, but rather to examine the constitutionality of aid to Larry Witters. Such questions rarely get raised, because it is rare that a state agency takes the position that its own funding statute is unconstitutional as applied to an individual recipient.

This raises the larger issue of the propriety of using the Establishment Clause as the basis of challenging the eligibility of a single individual in an otherwise neutral government

program. Although individual Establishment Clause challenges have been raised against individual religious institutions, this is the first case which raises the propriety of using the Establishment Clause to challenge the right of a single person to participate in a neutral government program.

This Court needs to address the issue of whether or not the Establishment Clause can be used by either government agencies or by "separation of church and state advocates" to judicially challenge the right of religious individuals to participate in government programs.

The decision of the Supreme Court of Washington represents an opening wedge in a possible entire new arena of church-state litigation if it becomes permissible to challenge individual

recipients of government aid because they might use their funds to foster their "religious goals and objectives."

The holding of the Washington court that permitting the Petitioner to participate in this program would have the primary effect of advancing religion would readily fall by the way if the entire program was examined as opposed to his sole participation. It is doubtful that the primary effect is to advance religion even when considering Witters alone. The primary effect is to train him for suitable employment consistent with his medical condition. But if the program is considered as a whole, as we believe should be done, there is no question that the primary effect of the program is to aid blind people in finding and holding employment through proper

training.

3. Finally, this case represents another important factual variation on a theme which this Court has addressed in several recent cases. Much like the college officials in Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed. 2d 440 (1982), and the drafters of the Tennessee Constitution in McDaniel v. Paty, 435 U.S. 618, 55 L.Ed. 2d 593, 98 S.Ct. 1332 (1978), the Commission for the Blind's excessive zeal to "separate church and state" under the Establishment Clause, appears to have created a clear-cut Free Exercise Clause violation. Although the principle from Widmar and McDaniel that the Establishment Clause needs to be considered in balance with the other First Amendment provisions guaranteeing Free Exercise of religion and freedom of speech

was argued to the Washington court, the majority ignored this line of reasoning. The dissent, however, recognized that the majority opinion's decision to deny aid to Witters premised on the Establishment Clause actually created a Free Exercise Clause violation.

This Court needs to give further consideration to the important principle of keeping the Establishment Clause in balance with the Free Exercise Clause. If lower courts, such as the Washington court in this case, stretch the Establishment Clause beyond its historical purpose, often there is a resulting Free Exercise problem.

II. The Decision Below Is in Conflict With Applicable Principles Established by This Court.

While, as a case of first impression, the decision below does not represent

a direct conflict with a particular decision of this Court, it states principles which ignore, or are opposed to, basic principles which this Court has established in its previous decisions:

1. Although the precise question of an individual using government funding to be trained as a minister has never previously arisen, other cases have presented Establishment Clause questions involving ministers. In each of these prior cases this Court found no Establishment Clause violation, although the "church and state" involvement would appear to have more potential entanglement than is present in this case.

In Marsh v. Chambers, -- U.S. --, 77 L.Ed. 2d 1019, 103 S.Ct. 3330 (1983), this Court decided that it was not unconstitutional to have a minister

hired as a legislative chaplain, paid with tax dollars. This decision was based on the clear historical intent of the framers of the First Amendment. In Marsh the minister was not merely being trained for the ministry, he was doing the work of a minister while on the government payroll.

Larry Witters could be employed by the State of Washington as a minister, either in the legislature or as a prison chaplain. It seems a bit inconsistent to allow a person to be employed as a minister using tax funds, yet prohibiting an individual from using a neutral vocational rehabilitation program to be trained for said vocation.

It is apparent that the Supreme Court of Washington's rationale was simply that the Establishment Clause prohibits the use of tax dollars in

any way which aids an individual minister. This is clearly unsupportable from this Court's decision in Marsh.

Likewise, the Tennessee Constitution was applied to prohibit a minister from seeking public office in McDaniel v. Paty, supra. Tennessee took the position that its constitution required a more stringent "separation of church and state" than was required by the federal constitution. The Tennessee rationale was very similar to the trial court's decision in this matter under the Washington State Constitution.

Tennessee's policy of prohibiting a minister from holding public office, which as a state legislator obviously involves receiving state money, was ruled unconstitutional by this Court. The heart of the Tennessee policy

was to single out ministers for disparate treatment in an otherwise neutral government endeavor. The same thing is true of the Washington policy.

The McDaniel principle that ministers cannot be singled out for disparate treatment was violated by the decision of the Washington court in this case.

2. This Court has ruled in a number of recent cases that it is not a proper use of the doctrine of "separation of church and state" to zealously deny religious activity equal treatment.

In Widmar v. Vincent, supra, this Court ruled that the religious content of speech on a public college campus could not be used as grounds for curbing such speech. In fact, this Court held that to do so created First Amendment violations of free

speech and free exercise.

In Lynch v. Donnelly, -- U.S. --, 79 L.Ed. 2d 604, 103 S.Ct. 1766 (1984), this Court held that the inclusion of a creche in a municipally sponsored Christmas display did not violate the Establishment Clause. This Court permitted the religious element to survive on an equal basis with other expressions of Christmas celebrations.

In Mueller v. Allen, -- U.S. --, 103 S.Ct. 3062, 77 L.Ed. 2d 721 (1983), this Court found that it was not a violation of the Establishment Clause to permit parents of private school students to be given a tax break for tuition payments even though this program was used primarily by religiously educated students. The underlying rationale this Court used in Mueller was that the Minnesota program had

the net result of treating all students in a roughly equal fashion. This decision permitted religious students to be treated in a fashion roughly equal to secular and public school students.

This Court in Lynch clearly indicated that equal treatment for religion was not a new requirement from this Court but rather was mandated by a proper reading of the entire line of church-state cases decided by this Court.

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation...." Committee for Public Education & Religious Liberty v. Nyquist, 413 US 756, 760, 37 L Ed 2d 948, 93 S Ct 2955 (1973). Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, e.g. Zorach v. Clauson, 343 US 306, 314, 315, 96 L Ed 954, 72 S Ct 679 (1952); McCollum v. Board of Education, 333 US 203, 211, 92 L Ed 649, 68 S Ct 461, 2 ALR2d 1338 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Zorach, supra, at 314, 96 L Ed 954, 72 S Ct 679. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." McCollum, supra, at 211-212, 92 L Ed 649, 68 S Ct 461, 2 ALR2d 1338.
>
> ---Lynch, supra, 79 L.Ed. 2d at 610.

These recent cases clearly enunciate this Court's longstanding constitutional framework that in effect says: The Establishment Clause does not require disparate treatment of religious activity

and the Free Exercise Clause does not permit it.

This Court's clear stand on the religion clauses were completely ignored by the Washington Supreme Court when it held that the Establishment Clause requires that an individual blind student who wanted to be a minister be singled out for disparate treatment because his vocational objective was too religious. Larry Witters received "callous indifference" at best, and "hostility" at worst because of his religious career objective, rather than the accommodation that is constitutionally mandated.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Washington State Supreme Court.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LARRY WITTERS,

Appellant,

v.

THE STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent.

No. 49273-1

DECISION AND OPINION

October 4, 1984

PEARSON, J.

This appeal involves the denial by the Washington State Commission for the Blind[1] (Commission) of financial vocational assistance to a person studying in preparation for a career as a pastor, missionary, or youth

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[1]The Washington State Commission for the Blind has been renamed the Department of Services for the Blind, effective June 30, 1983. Laws of 1983, ch. 194 sec. 3., p. 1050.

director. The Commission denied appellant Witters' request for financial assistance on March 11, 1980, based on an interpretation of the "religion clauses" of the Washington State Constitution, article 1, section 11, and article 9, section 4.

We affirm the decision of the Commission. We hold the provision of state aid to a person studying to be a pastor, missionary, or church youth director violates the establishment clause of the first amendment to the United States Constitution. Since our state constitution requires a far stricter separation of church and state that the federal constitution (see Weiss v. Bruno, 82 Wn.2d 199, 509 P.2d 973 (1973)), it is unnecessary to address the constitutionality of the aid under our state constitution.

Appellant Witters meets the medical

and physical eligibility requirements for status as a legally blind person, qualifying him to receive vocational assistance pursuant to RCW 74.16. (Repealed, Laws of 1983, ch. 194, sec. 30, pp. 1057-58).

Appellant initially requested financial aid while pursuing a 3-year Bible diploma course of study that the Inland Empire School of the Bible in Spokane, Washington. He later changed to a 4-year program which result in a biblical studies degree from Inland Empire School of The Bible, and a bachelor of arts degree from Whitworth College.

Appellant sought an administrative review of the Commission's decision, which resulted in a reaffirmation of the initial denial of assistance. An appeal was taken to the Spokane County Superior Court pursuant to

the provisions of RCW 74.16.530(1) and the administrative procedure act, RCW 34.04. After the submission of briefs and oral argument, the trial court upheld the Commission's decision to deny financial assistance based upon an interpretation of the Washington Constitution. The trial court's findings of fact and conclusions of law and an order affirming the Commission's decision were entered on May 26, 1982. Appellant appealed that decision to Division Three of the Court of Appeal, which then certified the case to this court pursuant to RCW 2.06.030(2)(d).

I

Appellant seeks financial assistance for his education pursuant to RCW 74.16.181. The relevant portions of this provision read as follows:

The commission may maintain

or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care. Services provided for under this section may be furnished to clients from other agencies of this or other states for a fee which shall not be less than the actual costs of such services. Under such program the commission may:

. . . . .

(3) Provide for special education and/or training in the professions, business or trades under a vocational rehabilitation plan, and if the same cannot be obtained within the state, provisions shall be made for such purposes outside of the state. Living maintenance during the period of such education and/or training within or without the state may be furnished.

The Supreme Court has developed a three-part test for determining the constitutionality of state aid under the establishment clause of the First Amendment.

> First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-12, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). To withstand attack under the establishment clause, the challenged state action must satisfy each of three criteria.

A. Purpose

Applying the first factor of the Lemon test to the present statute is quite easy. As stated in part in the statute itself:

> The commission [for the blind] may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care.

RCW 74.16.181. The secular purpose requirement has become a largely perfunctory inquiry easily satisfied by any legislative recitation of purpose. As the Supreme Court recently states in Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983):

> [G]overnment assistance programs have consistently survived this [secular purpose] inquiry ... This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute.

Mueller, 463 U.S. at ---, 103 S.Ct at 3066, 77 L.Ed.2d at 728. The state clearly has an interest in assisting the visually handicapped. We need only look to the above quoted statement of purpose found in RCW 74.16.181 to hold that this statute has a valid secular legislative purpose.

B. Effect

The second part of the Lemon test, that the primary effect of the state aid must neither advance nor inhibit religion, requires that we "narrow our focus from the statute as a whole to the only transaction presently before us." Hunt v. McNair, 413 U.S. 734, 742, 93 S.Ct. 2868, 2874, 37 L.Ed.2d 923 (1973). Rather than look to the face of the rehabilitation statute, which is neutral in that benefits are provided to the student irrespective of the type of school attended or the degree sought, we focus our attention on the particular aid sought by the appellant.

In Hunt, the Court offered guidance for making this "primary effect" determination.

> Aid normally be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so

> pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

(Emphasis ours.) Hunt, at 743, 93 S.Ct. at 2874. Additional guidance is found in Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) (plurality opinion).

> The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious alike.

Roemer, at 747, 96 S.Ct. at 2345.

The provision of financial assistance by the state to enable someone to become a pastor, missionary, or church youth director clearly has the primary

effect of advancing religion. Appellant is not pursuing a secular course of study with the personal objective of becoming a minister. The curriculum for his course of pastoral study includes classes in Old and New Testament studies and church administration. It is not the role of the state to pay for the religious education of future ministers. We hold that the principal or primary effect of the aid sought by appellant would be to advance religion, and would thus violate the establishment clause of the First Amendment.

C. Entanglement

The third criterion of the Lemon test is that the aid must not foster an excessive government entanglement with religion. In Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Supreme Court set forth a three-pronged inquiry to determine

the existence of excessive entanglement. The relevant factors are: (1) the character and purpose of the institutions that are benefited, (2) the nature of the aid that the government provides, and (3) the resulting relationship between the government and the religious authority. Lemon, at 615, 91 S.Ct. at 2112. Typically this inquiry involves a state legislative attempt to provide aid to all of the state's private schools. For example, Lemon involved both Rhode Island and Pennsylvania statutes which provided extensive state aid to private schools. The Rhode Island statute provided salary supplements for teachers of secular subjects in private schools. The Pennsylvania program involved the reimbursement of private schools for teachers' salaries, textbooks, and instructional materials. The case

before us is much different. This case involves one person's effort to get financial assistance for his theological training. The three-pronged "entanglement" inquiry is ill-suited to this case. In addition, the administrative and trial court records do not provide an adequate factual basis to make the type of inquiry contemplated by the Supreme Court.

Since we have held that the aid sought by the appellant would violate the establishment clause because it would have the primary effect of advancing religion, it is unnecessary for us to attempt a strained analysis of the "entanglement" factor of the Lemon test.

II

Appellant makes two additional arguments: first, that the Commission's denial of aid violates the free exercise

clause of the First Amendment; and second, that the Commission's action violates the equal protection clause of the Fourteenth Amendment.

A. Free Exercise

For a violation of the free exercise clause, one must show "the coercive effect of the enactment as it operates against him in the practice of his religion." School Dist. v. Schempp, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963). The challenged state action must somehow compel or pressure the individual to violate a tenet of his religious belief. In Thomas v. Review Bd., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the Court noted:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious faith, thereby

> putting substantial pressute on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Thomas, at 717-18, 101 S.Ct. at 1432. Thomas involved the State of Indiana's denial of unemployment compensation benefits to a Jehovah's Witness who terminated his employment with a company which fabricated steel when he was transferred from the roll foundry to a department that produced turrets for military tanks. He claimed his religious beliefs prevented him from participating in the production of war materials. The Court held the denial of unemployment benefits was a violation of the free exercise clause since it forced him to choose between "fidelity to religious belief or cessation of work. . ." Thomas, at 717, 101 S.Ct. at 7431-32.

In the present case, the Commission's

denial of vocational aid to the appellant did no compel or pressure him to violate his religious beliefs. Appellant chose to become a minister, and the Commission's only action was to refuse to pay for his theological education. The Commission's decision may make it financially difficult, or even impossible, for appellant to become a minister, but this is beyond the scope of the free exercise clause. We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution.

B. Equal Protection

Appellant's final argument, that the Commission's action violates the equal protection clause of the Fourteenth Amendment, is quite novel. This argument was premised on the ground that the aid sought was allowable under the

federal constitution, but was denied by the Commission solely because it would violate the religion clauses of the state constitution. Const. art. 1, sec. 11 and Const. art. 9, sec. 4. We have held that to provide the aid sought by the appellant would violate the establishment clause. This precludes any need to determine whether the denial of aid on state constitutional grounds would violate the equal protection clause of the Fourteenth Amendment.

We affirm the decision of the Commission to deny appellants' request for financial assitance.

WILLIAM H. WILLIAMS, C.J, ROSELLINI, BRACHTENBACH, DORE and DIMMICK, JJ. and CUNNINGHAM, J. Pro Tem., concur.

ROSELLINI, Justice (concurring).

I agree with the majority. The

separation of church and state, mandated by Const. art 1, sec. 11 and Const. art. 9, sec. 4, would be violated by financing appellant's vocational instruction as a minister.

The dissent asserts, however, that the majority's decision is rendered "without sufficient facts or justification." This contention is without merit. We need look no farther than the plain language of our constitutional provisions, which state, in part:

> No public money or property shall be appropriated for or applied to any religious worship exercise or instruction, or the support of any religious establishment:

(Italics mine.) Const. art 1, sec. 11.

> Sec. 4 SECTARIAN CONTROL OR INFLUENCE PROHIBITED. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

Const. art. 9, sec. 4.

Moreover, our interpretation of these provisions has consistently rejected any inroads on the absolute prohibition contemplated by our forefathers. Thus, in Weiss v. Bruno, 82 Wash.2d 199, 206, 509 P.2d 973 (1973), we observed:

> In deciding these questions we recognize that the proscription of article 9, section 4 is far stricter than the more generalized prohibition of the first amendment to the United States Constitution. While the establishment clause broadly condemns any law "respecting an establishment of religion," our constitution specifically demands that no public funds be used to maintain or support any school which is under sectarian control or influence. There is no such thing as a "de minimis" violation of article 9, section 4. Nor is a violation of this provision determined by means of a balancing process. The words of article 9, section 4 mean precisely what they say; the prohibition is absolute.
>
> It is indisputable that this more restrictive clause was the deliberate design

> of the framers of our constitution.

(Footnotes omitted.)

To finance appellant's career goal of becoming a minister would violate this absolute prohibition. This we cannot do.

APPENDIX B

UTTER, Justice (dissenting):

The majority holds that under the establishment clause of the United States Constitution, the State must single out handicapped college students who wish to pursue religious careers and deny them vocational rehabilitation assistance that is otherwise available to all handicapped college students in Washington. The majority also concludes that denying aid under a general educational program only to those who wish to pursue religious careers does not violate the free exercise clause of the First Amendment. Finally, the majority concludes that the federal constitutional issues should be decided before and to the exclusion of the state constitutional issues that form the primary basis for this appeal. I dissent from all

these decisions.

I.

I agree with the majority that in order to withstand attack under the First Amendment's establishment clause, the granting of educational assistance sought by appellant must satisfy all three parts of the Lemon test, which requires:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion."
>
> Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

I also agree with the majority's conclusions that the vocational rehabilitation statute has a secular legislative purpose, that the "entanglement" inquiry is ill-suited to this type of situation,

and that the record does not provide us with sufficient information to find that an unconstitutional level of "entanglement" would result from allowing religious students to take advantage of the same vocational education benefits that are made available to all other handicapped Washingtonians. However, I disagree with the majority's conclusion that granting vocational rehabilitation assistance to all otherwise eligible students would have a "principal or primary effect" of advancing religion in violation of the First Amendment.

The majority relies on two cases for guidance in determining whether the aid sought here would have the primary effect of advancing religion. In Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973), the United States Supreme Court upheld a statute that authorized the issuance

of revenue bonds for construction of facilities at the Baptist College of Charleston. The Court began its analysis of the "primary purpose" of the scheme by noting that "[w]hatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected." Hunt, at 742, 93 S.Ct. at 2874. The Court went on to hold that the primary effect of the scheme was not to advance religion, because the record did not contain sufficient evidence of the "pervasively sectarian" nature of the Baptist College, or that the state had helped to fund the religious (as opposed to secular) activities of the College. The record in Hunt appears to have been much more detailed and specific about the answers to theses questions than the

record in this case.

In Roemer v. Bd. of Public Works, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976), Maryland gave grants to a number of religious and nonreligious colleges, with a statutory requirement that the funds not be used for sectarian purposes. A 3-judge plurality upheld the statute after applying the Lemon test, and finding it unnecessary under the circumstances to elaborate on what constitutes a "specifically religious activity" that would have the "primary effect" of advancing religion. Roemer, at 760-61, 96 S.Ct. at 2351-52. In reaching its decision, however, the plurality observed that a "hermetic separation" betwe n church and state is impossible and has never been required, Roemer, at 746, 96 S.Ct. at 2344-45 and that

> religious institutions need

not be quarantined from public benefits that are neutrally available to all. The Court has permitted the State to supply transportation for children to and from church-related as well as public schools Everson v. Bd. of Ed., (citations omitted). It has done the same with respect to secular textbooks loaned by the State on equal terms to students attending both public and church-related elementary schools, Bd. of Ed. v. Allen, (citations omitted). Since it had not been shown in Allen that the secular textbooks would be put to other than secular purposes, the Court concluded that, as in Everson, the State was merely "extending the benefits of state laws to all citizens." Id., at 242 [88 S.Ct. at 1926] Just as Bradfield v. Roberts, (citations omitted) dispels any notion that a religious person can never be in the State's pay for a secular purpose, Everson and Allen put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity.

Roemer, at 746-47, 96 S.Ct. 2344-45

As the discussion above illustrates,

neither of the cases relied on by the majority is directly on point, and each provides only vague, general guidance in deciding the case at bar. A better approach may be gleaned from a line of cases that includes Roemer, but actually begins with Committee for Pub. Ed. & Rel. Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). In Nyquist, the Court struck down a complex set of State programs to aid nonpublic elementary and secondary schools, including a tuition grant program that reimbursed low-income parents for part of the cost of their children's tuition at nonpublic schools. The Court distinguished the invalid tuition grants in Nyquist from the constitutional aid programs upheld in Bd. of Ed. v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) and Everson v. Bd. of

Ed., 330 U.S. 1, 67 S.CT. 504, 91 L.Ed.2d 711 (1947), as follows:

> Allen and Everson differ from the present litigation in a second important respect. In both cases, the class of beneficiaries included all schoolchildren, those in public as well as those in private schools. See also Tilton v. Richardson, supra, in which federal aid was made available to all institutions of higher learning, and Walz v. Tax Comm'n, supra, in which tax exemptions were accorded to all educational and charitable nonprofit institutions...
>
> Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g. scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See Wolman v. Essex, (citations omitted). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance of the "G.I. Bill, 38 U.S.C. sec. 1651, impermissibly advances religion in violation of the Establishment Clause.

Nyquist 413 U.S. at 782, n. 38, 92 S.Ct. at 2970, n. 38.

The Court also reinterated its earlier observation that there are significant differences between the religious aspects of church-related colleges and parochial elementary and secondary schools, since the former are far less likely to make religious indoctrination a major part of their programs, and are far less likely to to be successful at indoctrinating college students even if they tried to do so. See Tilton v. Richardson, 403 U.S. 672, 685-86, 91 S.Ct. 2091, 2099-2100, 29 L.Ed.2d 790, rehg denied, 404 U.S. 874, 92 S.Ct. 25, 30 L.Ed.2d 120 (1971); Hunt v. McNair, supra, 413 U.S. at 746, 93 S.Ct. at 2875; Nyquist, supra, 413 U.S. at 777, n. 32,

93 S.Ct. at 2967, n. 32; see also Americans United for Separation of Church and State Fund, Inc., v. State, 648 P.2d 1072, 1079 (Colo. 1982), Americans United v. Rogers, 538 S.W.2d 711, 717, 722 (Mo.) cert. denied, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976).

In Wolman v. Essex, 342 F.Supp 399 (S.D. Ohio) aff'd, 409 U.S. 808, 93 S.Ct. 61, 34 L.Ed.2d 69 (1972), cited with approval in Nyquist, the district court permanently enjoined a state program providing, among other things, tuition reimbursement grants to parents of children attending nonpublic elementary and secondary schools, 95% of whom attended Catholic parochial schools. In determining the primary effect of the program, the court looked to "the class to which [the program] is directed and that will be affected

by it" Wolman, at 412. This approach led the court to distinquish the invalid program from the valid programs in Everson, Walz v. Tax Comm'n., 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), and Tilton, on the grounds that the valid programs were directed to abroad class that was not predominately composed of persons attending religious schools, and analogized such cases to situations in which the state provides police and fire protection to all regardless of religious affiliation. Wolman, at 412-13. The Court also dismissed one of the proponents arguments by stating:

> Defendants attempt to analogize the statute at bar to statutes which provide economic aid to R.O.T.C. students or student-veterans, regardless of the school at which they attend. This analogy must fail, for if religious schools indirectly derive benefit from such programs, this benefit is entirely incidental

> and subordinate to the legitimate secular purposes underlying their enactment - purposes which have nothing whatever to do with religion.

Wolman, at 412, n. 17

Finally, the United States Supreme Court's most recent pronouncement on this issue is found in Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983). In that case, the Court upheld a statute giving the parents of public and private school students alike state income tax deductions for tuition, textbooks and transporation expenses related to their children's primary and secondary education. The program was found constitutional, in spite of the fact that about 95% of students attending private schools in the state attended sectarian schools, Mueller, 103 S.Ct. at 3065, 3070, and that public school children had no tuition payments to

deduct. See Mueller at 3070. The Court considered several factors in determining that the scheme did not have a primary effect of advancing religion, two of which are applicable to the case at bar:

> Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools. Just as in Widmar v. Vincent, (citation omitted), where we concluded that the state's provision of a forum neutrally "open to a broad class of nonreligious as well as religious speakers" does not "confer any imprimatur of State approval," so here: "the provision of benefits to so broad a spectrum of groups is an important index of secular effect."
>
> In this respect, as well as others, this case is vitally different from the scheme struck down in Nyquist. There, public assistance amounting to tuition grants, was provided only to parents of children

in nonpublic schools. This fact had considerable bearing on our decisions striking down the New York statute at issue; we explicitly distinguished both Allen and Everson on the grounds that "In both cases, the class of beneficiaries included all school children, those in public as well as those in private schools." ... Moreover, we intimated that "public assistance (e.g. scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited," ibid, might not offend the Establishment Clause. We think the tax deduction [in this case] is more similar to this latter type of program than it is to the arrangement struck down in Nyquist. Unlike the assistance at issue in Nyquist, [this scheme] permits all parents - whether their children attend public school or private - to deduct their chidlren's educational expenses. As Widmar and our other decisions indicate, a program... that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

We also agree with the Court of Appeals that, by

> channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject .... Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of State approval"... can be deemed to have been conferred on any particular religion, or on religion generally.

(Footnotes and citations omitted.) Mueller, at 3068-69.

The vocational rehabilitation program in the case at bar is a general financial aid program for handicapped students that is available or potentially available to all handicapped students regardless of their religion, their plans to attend a public or private, sectarian or nonsectarian college, and their secular or religious career goals. It is highly unlikely that only a very small percentage of the

handicapped students benefited by the program would choose to pursue religious career training, and that those that do will provide the institution they attend only indirect and incidental benefits from state funds resulting entirely from the individual student's own personal, uncoerced choice of college, a situation that grants no "imprimatur of state approval" for any particular religious college or career. Furthermore, as discussed below, it is unclear from the record whether the instruction Mr. Witters wishes to receive is sectarian or involves religious indoctrination in any meaningful constitutional sense, although the fact that the instruction occurs at the college level would probably lead the United States Supreme Court to assume that the instruction was not so tainted. Even if the instruc-

tion were sectarian, however, as long as the program grants vocational rehabilitation aid to all handicapped students equally, the fact that a few might choose to spend their money on vocational training with a religious career in mind does not give the program a "principal or primary effect" of advancing religion. The clear trend of recent federal caselaw discourages such a result, and we should not go beyond the interpretation of the United States Supreme Court in construing the federal constitution.

II

Appellant also argues that denying him financial assistance that is available to all other handicapped Washingtonians solely because he wishes to pursue a religious career is a violation of the free exercise clause of the federal bill of rights. The majority

points out that to show a violation of the federal free exercise clause, one must show "the coercive effect of the enactment as it operates against him in the practice of his religion'". Majority, at 7 (quoting School Dist. v. Schempp, 374 U.S. 203, 223 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963). Although I do not dispute this statement as an abstract proposition, I disagree with the majority's peremptory conclusion that denying appellant assistance that is available to all other persons similarly situated solely because of his religious career goals does not constitute "coercion." In McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978), for example, the United States Supreme Court held that a state's constitutional prohibition on ordained ministers serving in the state legislature and its limited

constitutional convention violated the federal free exercise clause. The Court stated:

> the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions, or, in other words, to be a minister of the type McDaniel was found to be. Tennessee also acknowledges the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention. Yet under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of the one on the surrender of the other. Or, James Madison's words, the State is "punishing a religious profession with the privation of a civil right." In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively

> penalizes the free exercise of [his] constitutional liberties."

(Citations omitted. Bracketed material in original.) McDaniel, at 626, 98 S.Ct. at 1327. In this case, as in McDaniel, appellant is forced to choose between pursuing his religious career and taking advantage of certain benefits or rights that the State provides to all other similarly situated persons. While there are some obvious distinctions between denying a person the right to run for office and denying him financial assistance because of his religious occupation, I believe that both constitute "coercion" within the meaning of the free exercise clause, since both penalize the choice of a religious career.

Two other United States Supreme Court cases also support this conclusions. In Sherbert v. Verner, 374 U.S. 398,

83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the Court held that the federal free exercise clause prohibited a state from denying unemployment compensation benefits to a worker who was fired because her religious beliefs prevented her from performing Saturday work assigned to her by her employer. The Court explained its decision by stating that

> "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." ... Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion

> in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

(Citations omitted.) Sherbert, at 404, 83 S. Ct. at 1794. The Court added that the constitutional infirmity could not be cured by holding that unemployment compensation is merely a privilege rather than a right, since "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege." Sherbert, at 404, 83 S.Ct. at 1794.

Similarly, in the more recent case of Thomas v. Review Board, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the Court quoted extensively from Sherbert in deciding that unemploy-

ment compensations could not, consistent with the mandate of the free exercise clause, be denied to a person who quit his job because his religion prohibited from participating in the production of military weapons. The Court held that

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas, at 717-18, 101 S.Ct. at 1432.

Finally, I question how the State's policy in the case at bar can be found consistent with its obligation under the federal free exercise clause to "accomodate" religion. See Sumner

v. First Baptist Church, 97 Wash.2d 1, 12, 639 P.2d 1358 (1982) (Utter,J. concurring); Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 964 (1952).

The facts of this case are very similar to those in Sherbert and Thomas. While the State is not obligated to provide handicapped vocational education assistance, once it decides to do so I believe that the free exercise clause forbids the state from penalizing those who have chosen religious careers by excluding them from a general financial aid program solely for that reason.

III

The majority holds that "the provision of state aid to a person studying to be a pastor, missionary, or church youth director violates the establishment clause of the first amendment to the United States Constitution." Majority, at 5. The majority

goes on to state that "[s]ince our state constitution requires a far stricter separation of church and state than the federal constitution ...,it is unnecessary to address the constitutionality of the aid under our state constitution." Majority, at 5.

For guidance in future cases before the courts of this state we should comment on the position our state constitution requires us to hold. An in-depth analysis of the historic purpose and meaning of Const. art. 1, sec. 11 shows that that provision does not prohibit the use of public money for the purposes proposed by Mr. Witters, and that the State's denial of aid to Mr. Witters based on the misperceived mandate of Const. art 1, sec. 11 was improper.

A

When the delegates to the Washington Constitutional Convention met in Olympia on July 4, 1889, their single overriding purpose was to pave the way for Washington's admission into the Union. In order to gain for Washington the long-sought status of a sovereign state, the delegates had to agree on a constitution that was acceptable to Congress, which had spelled out some of its requirements in the Enabling Act that authorized the Convention. In addition, the new constitution would have to be approved by a majority of Washingtonians, many of whom were deeply concerned with the then-current debate over the proper relationship between government and religion.

Section four of the Enabling Act commanded that "provision shall be made (in the new constitution)

for the establishment and maintenance of systems of public schools, which shall be open to all the children of (Washington), and free from sectarian control." 25 Stat. 676 (approved Feb. 22, 1889) reprinted in Revised Code of Washington, vol. 0 (1983). This provision reflected a widespread concern about the still-common practice of Bible reading and other forms of sectarian religious instruction in the public primary and secondary schools. See D. Boles, The Bible, Religion, and the Public Schools 35 (1961). Such practices were particularly offensive to the recent waves of Catholic and Jewish immigrants who objected to their children receiving compulsory instruction in the majority Protestant faith. See D. Boles, supra at 28-30, 32. Similarly, many Protestants objected to giving public subsidies to Catholic

parochial schools. See generally B. Parkany, "Religious Instruction" in the Washington Constitution (1965) (thesis available in the Washington State Library); D. Boles, supra.

In the decades before the Washington Constitutional Convention, the Republicans, who dominated the Convention, became the primary advocated of church-state separation. For example, in 1876 and 1880 the Republican party platforms called for a federal constitutional amendment "'forbidding the application of any public funds or property for the benefit of any school ot institution under sectarian control.'" B. Parkany, pt. 2, at 11.

The Democrats, with their large urban Catholic constituency, were said to favor tax support of parochial schools. B. Parkany, pt. 2, at 7; D. Boles, at 30-31. By 1889, however,

due in part to the efforts of the famous educator Horace Mann, this was a minority position. The general consensus in Washington and the rest of the nation was that public schools should not give sectarian religious instruction, and that private parochial schools should not be supported by public funds. See B. Parkany, pt. 2, at 14; D. Boles. at 23-27, 33. This attitude was reflected in many state constitutions, including Washington's, that were written in the last half of the 19th century. D. Boles, at 33-34.

That the Convention was concerned with forced religious instruction in public primary and secondary schools and public aid to parochial schools is supported by a number of circumstances surrounding the adoption of the "religious instruction" clause itself. On July

17, 1889, the Seattle Post-Intelligencer and the Tacoma Morning Globe both printed the Bill of Rights Committee's first draft of Const. art. 1 sec. 11, which at that point contained no mention of "religious instruction." It read, in pertinent part: " No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution."

Two days later, on July 19, the Portland Oregonian, which was one of the most widely read newspapers in Washington Territory, ran an editorial concerning "religious instruction" in public schools. The editorial, which was prompted by a debate in an eastern journal on the same subject, used the phrase "religious instruction" six times, and concluded with a strong stand:

> In order that liberty of conscience may remain inviolate as intended by our constitution builders, there must be an absolute separation of church and state, religion and public schools; and in order to guide the public school system onward to the fulfillment of the mission that called it into existence, it is necessary to keep the public schools free from religious influences, from theological disputes and sectarian teachings....
>
> ... Religious instruction in the public school means a gradual retrogression to the union of church and state, and this union means a tyrannical government and a corrupt priesthood.... Religious instruction ought not to be ignored, but the home and church are the places wherein both precept and example will be most effective; but if liberty of conscience is valued at all, keep religion away from the public schools.

The Oregonian, July 19, 1889, at 4, col. 2.

On the same date, the Spokane Falls Review ran an article on the

same subject. The Review article, which also used the phrase "religious instruction," summarized the positions of eminent clergymen on both sides of the debate. Spokane Falls (Daily) Review, July 19, 1889, at 3.

Two days later, the Oregonian printed a lengthy and thoughtful letter responding to the Oregonian's "religious instruction" editorial. The letter stated:

> Whenever the Protestant version of the Bible is read as an act of worship in the public schools, the consciences of Roman Catholics, Jews, agnostics, spiritualists, materialists and those holding several other forms of faith, are violated. Wherever, as in some localities, Catholic sisters or priests appear in the public schools, in their religious garb, and conduct religious worship in conjunction with their work as teachers, the conscientious objections of all denominations except the Catholic are disregarded. Whenever the Lord's prayer is recited or extempore prayer

> is made, or religious hymns are sung, the religious views of some portion of the people are trampled upon in an institution sustained by enforced taxation and which should be open to all. To this it is answered by the advocated of these policies that religious instruction of some kind is an essential part of education. And to this, again, the opponents of these policies reply that, whether religious instruction be essential to education or not, it is not a kind of instruction which can be imparted in public schools.

Letter from B.F. Underwood, The Oregonian, July 21, 1889, at 6. cols. 5,6. Mr. Underwood concluded:

> As the right of the majority to govern the individual in matters of religion is not now delegated by any American constitution to any legislature, the right stands reserved to each American citizen, and any exercise of it in the least degree by a legislature is a usurpation of tyranny unjust annd unrepublican.

On July 25, a few days after the flurry of newspaper editorials,

327 (1925). It also provides strong evidence about the history and circumstances of the enactment and the evils that the constitutional provision were intended to correct, both of which may be considered in constitutional construction. See Yelle v. Bishop, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959), State ex rel. Evans v. Brotherhood of Friends, 41 Wn.2d 133, 146, 247 P.2d 787, 795 (1952), Bowen v. Department of Social Sec., 14 Wn.2d 148, 150, 127 P.2d 682, 684 (1942) and Sears v. Western Thrift Stores, 10 Wn.2d 372, 382, 116 P.2d 756, 761 (1941).

Additional and even more convincing evidence about the meaning of the phrase "religious instruction" can be found in the relevant debates on Const. art 9, sec. 4, which occured four days after the Conventions final passage of Const. art 1, sec. 11.

B. Rosenow ed. at 268, 328-29. At that point, Const. art. 9, sec. 4, read, "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Tacoma Ledger, Aug. 11, 1889, at 4, col. 2. Mr. Comegys, a member of the Bill fo Rights Committee, unsuccessfully tried to amend this section on the floor of the Convention by adding the words, "and no religious exercises or instructions shall be permitted therein." B. Rosenow, ed., at 329; Tacoma Ledger, at 4. Mr. Comegys explained the need for the amendment to his fellow delegates by stating that "sectarians had not been by the courts prohibited from reading Bibles or prayers. That was not toleration to Jews, Catholics, agnostics, Mohammedans and several other creeds and sects who were entitled to it as much as

a few days after the flurry of newspaper editorials, articles and letters to the editor on religious instruction in the public elementary and secondary schools, the Bill of Rights Committee submitted its amended report to the Convention. The new draft, which was later adopted by the Republican-dominated Convention, without debate, read in pertinent part as follows:

> No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction or the support of any religious establishment.

Journal of the Washington State Constitutional Convention, 1889, at 500 (B. Rosenow ed. 1962) (analytical index by Q. Smith) (hereinafter B. Rosenow ed.). See also B. Parkany, pt. 1, at 1.

While I can find no direct evidence that the members of the Bill of Rights Committee borrowed the phrase, "religious

instruction" from the newspaper pieces that were published between the first and the final drafts of its report, the circumstantial evidence is strong. Moreover, even if the nearly simultaneous uses of the phrase, "religious instruction" by the delegates and the newspapers were merely coincidental, the frequent use of the phrase in the popular press and the contemporaneous public concern on the subject of religious instruction in the public primary and secondary schools with which the phrase was connected does provide uncontradicted evidence as to the "common and ordinary meaning " of the phrase and what it would have meant to a delegate or voter in 1889. See generally State ex. rel. Albright v. Spokane, 64 Wash.2d 767, 770, 394 P.2d 231, 233 (1964); B.F. Sturtevant Co. v. Industrial Comm'n, 186 Wis. 10, 19, 202 N.W. 324,

327 (1925). It also provides strong evidence about the history and circumstances of the enactment and the evils that the constitutional provision were intended to correct, both of which may be considered in constitutional construction. See Yelle v. Bishop, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959), State ex rel. Evans v. Brotherhood of Friends, 41 Wn.2d 133, 146, 247 P.2d 787, 795 (1952), Bowen v. Department of Social Sec., 14 Wn.2d 148, 150, 127 P.2d 682, 684 (1942) and Sears v. Western Thrift Stores, 10 Wn.2d 372, 382, 116 P.2d 756, 761 (1941).

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Protestants..." Tacoma Ledger at 4, col. 2.

One early Washington case directly addresses the intent of the framers in drafting Const. art.1, sec 11. In State ex rel. Dearle v. Frazier, 102 Wash. 369, 173 P.35 (1918), this court held unconstitutional a plan to give public high school students credit for studying the Bible outside of school. Although the current validity or applicability of much of that case is questionable in light of Calvary Bible Presbyterian Church v. Bd. of Regents, 72 Wash.2d 912, 436 P.2d 189 (1967) cert. den. 393 U.S. 960, 89 S.Ct. 389, 21 L.Ed.2d 372 (1968), no subsequent case has challenged the accuracy of the Dearle court's statement that

> it is a matter within the common knowledge of those who followed the discussion

> attending the framing of our [state] constitution that it was the purpose of the men of that time to avoid all of the evils of religious controversies, the diversion of school funds to denominational schools and institutions, and the litigation that had occurred in other states... The question then was-and the people who adopted the constitution wer so advised - whether we hold adopt a constitution which provided in terms that no religious instruction should ever be a part, directly or indirectly, of the curriculum of our schools.

(Italics mine) Dearle, 102 Wash. at 381, 173 P.35.

The early Attorney Generals' opinions also demonstrate that Const. art 1, sec. 11, was applied primarily in the context of prohibiting certain kinds of devotional sectarian instruction in public primary and secondary schools. See e.g., AGO, Sept. 19, 1891, (Bible reading, prayers, and devotional religious exercises in public schools prohibited

by Const. art. 1, sec. 11), AGO Dec. 20, 1909, (unconstitutional to open public school day with prayer); AGO, March 24, 1916, (unconstitutional to give public high school credit for optional Bible study).

From all of the above evidence, I conclude that Const. art. 1, sec. 11, with its use of the phrase, "religious instruction,"was intended merely to prohibit sectarian religious instruction in the public schools, and to prevent direct public subsidies to parochial shcools. There is no indication the framers had the slightest intention of making a secular career goal a constitutional prerequisite for any type of aid to the "poor and infirm." See generally, Const. art. 8, sec. 7. No such problem existed at the time our constitution was drafted, and we should not, by judicial interpretation,

extend its words to cover situations that the document's text and history indicate were never contemplated by the drafters.

B

Even if Const. art. 1, sec. 11 were meant to prohibit educational assistance to handicapped persons seeking "religious" vocational instruction, the record does not support a finding that "religious instruction" is involved here. Appellant Witters was denied funds not because the college of his choice was religiously oriented, but because his vocational objective was to become a pastor, missionary or youth director.

As demonstrated by the sole applicable Washington case, the only way to determine whether Mr. Witters proposed instruction is religious within the meaning of Const. art. 1 sec. 11 is to examine

the instruction itself and see whether it is taught in an objective manner or in a devotional manner that resembles worship or indoctrination Calvary Bible Presbyterian Church v. Bd. of Regents, supra. Although the record is notably lacking in evidence regarding the manner of instruction, the parties had stipulated that "[Mr. Witters] classwork consists of classes instructional in nature for which he pays tuition. There are also devotional chapel services at the school for which he pays nothing." Petitioner's Proposed Factual Stipulation, dated Aug. 11, 1980 (signed by counsel for both parties); see also Appellant's Memorandum of Authorities (before the Hearings Examiner) at 6. The parties also stipulated that the college Mr. Witters wished to attend was not a denominational or sectarian institution, but offered instruction on a nondenomina-

tional basis. Verbatim Report of Proceedings, at 6.

Aside from the stipulated facts, the record is totally devoid of any independent evidence as to how the courses were taught. Such courses as Old Testament history and church administration could well be taught in an objective, nondevotional manner, even in a private "religious" college. It is likely that all or most of those attending the college are already believers of various religious doctrines, and attend the college to gain factual and practical knowledge that will help them attain their career objectives and teach others what they believe to be true. If the court wished to determine whether Mr. Witters received devotional instruction in violation of Const. art. 1, sec. 11, it should remand the case so that the appropriate

fact-finding body could determine just how the courses were conducted. See Calvary Bible Presbyterian Church v. Bd. of Regents, supra, State ex rel. Gunstone v. State Hwy Comm'n, 72 Wn.2d 673, 674-75, 434 P.2d 734 (1967); Skold v. Johnson, 29 Wn. App. 541, 630 P.2d 456 (1981); Franklin Cy. Sheriff's Office v. Sellers, 97 Wn.2d 317, 323, 646 P.2d 113 (1982) cert. denied 459 U.S. 1106, 103 S.Ct. 730, 74 L.Ed.2d 954 (1983).

C

There was also some contention by the State that providing vocational rehabilitation aid to Mr. Witters would violate article 9, sec. 4 of the Washington Constitution, and there is language in Weiss v. Bruno, 82 Wn.2d 199, 509 P.2d 973 (1973), that would support such a proposition. The arguments before this court in

this case have not provided us at this time with an adequate basis for declining to follow that case. My conclusions that the free exercise clause prohibits denial of vocational rehabilitation aid to Mr. Witters would make any possible bar established by Const. art.9 sec.4 and Weiss irrelevant, however, since under the supremecy clause state constitutions must yield to directly contrary provisions of the federal constitution. The question of the continuing vitality of Weiss may therefore be reserved until a more appropriate case arises.

IV

I would hold that the granting of vocational educational assistance to Mr. Witters would not violate Const. art. 1, sec. 11; that any bar to such aid presented by Const. art. 9, sec. 4, as interpreted in Weiss is overcome

by appellant's federal constitutional right to freely exercise his religious rights; and that the federal establishment clause does not bar the type of aid sought here. Such a result would be consistent with both the historic meaning of our state constitution and the American tradition of religious liberty as embodied in the free exercise clause of the First Amendment and as reflected in the current trend of cases emanating from the United States Supreme Court.

DOLLIVER, J., concurs.

APPENDIX C

IN THE SUPERIOR COURT

FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

No. 80-2-04706-4

LARRY WITTERS,

Plaintiff,

vs.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE coming on regularly for hearing before this court on December 11, 1981, plaintiff being represented by his attorney, MICHAEL P. FARRIS, the defendant appearing by and through its attorneys, KENNETH O. EIKENBERRY,

Attorney General, and ERNEST M. FURNIA, Assistant Attorney General, and the court having heard and considered the evidence of and on behalf of the parties and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1) That plaintiff Larry Witters has met and does meet the medical and physical eligibility requirements specified under Chapter 74.16 of RCW for status as a legally blind person qualifying him to receive educational assistance.

2) That the program by the Commission for the Blind is publically funded by a combination of approximatley 80% federal funds and 20% state funds.

3) That plaintiff Witters, was, at the time of the original hearing, enrolled as a student in the Inland Empire Bible School in Spokane, Washington.

4) That the Inland Empire Bible School is a private institution supported by private donations and tuition payments by students who attend that particular institution and is managed by a Board of Directors.

5) That the Inland Empire Bible School provides a Christian Education on a nondenominational basis offering a one-year Bible certificate, a three-year Bible diploma and a four-year Bachelor of Arts Degree.

6) That plaintiff Witters was originally pursuing a three-year Bible diploma course of study in order to equip himself for a position as a pastor, missionary or youth director, and is presently participating in the four-year program for the same vocational purpose.

7) That the curriculum for such a course of pastoral study included

Old and New Testament studies, ethics, speech and church administration.

8) That a policy statement for the Washington State Commission for the Blind established by the Commission states:

"Private institutions or out-of-state institutions: The Washington Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas."

9) That plaintiff Witters was denied Vocational Rehabiliation funds by the Washington State Commission for the Blind upon grounds for disqualification found in said policy statement.

From the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1) That the objective and purpose of RCW 74.16 is to create the Commission

for the Blind as a Washington State Commission and that RCW 74.16.181(3) specifically allows said Commission to provide for special education or training in business, professions or trade and to provide the payment of certain funds for such.

2) That RCW 74.16.450 empowers this Commission, through the director, to serve as the sole agency of the state in preparing, adopting and certifying state plans, rules and regulations for the blind and visually handicapped as set forth in this chapter and to seek federal funds for the same.

3) That Article IX, Section 4 and Article I, Section 11 of the Washington State Constitution direct that no public funds be used or maintained to support any sector which is under sectarian control or influence and that school systems are to be maintaiend

free from sectarian control.

4) That the Washington State Supreme Court in issues dealing with religion and religious affiliation has determined that public funds are not to become involved in the practice of religion or the fostering of religious education.

5) That the Commission has the right, under its authority to make rules, regulations and plans, to consider certain constitutional and statutory inhibitions in the application of its funding powers.

6) That the policy established by the Commission, of not providing public funds for a degree in theology or related areas, is applied and enforced uniformily to the particular relevant group of people, the visually handicapped, and thus there is no denial of equal protection to that restricted group.

7) That the policy established by the Commission was correct in the application of its funding powers in determining that the use of public funds, directly or indirectly, may not be provided to assist plaintiff in the pursuit of this specific course of study, career or degree in theology or related areas.

DONE IN OPEN COURT this 26th day of May, 1982.

MARCUS M. KELLY, Judge

IN THE SUPERIOR COURT

FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

No. 80-2-04706-4

LARRY WITTERS,

Plaintiff,

vs.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Defendant.

ORDER

THIS MATTER, having come on regularly for hearing in open court, plaintiff, Larry Witters, appearing by and through his attorney, MICHAEL P. FARRIS, the defendant, State of Washington Commission for the Blind, appearing by and through its attorneys,

KENNETH O. EIKENBERRY, Attorney General, and ERNEST M. FURNIA, Assistant Attorney General, and the court, having reviewed the record and considered all the evidence on behalf of the parties, and having entered its Findings of Facts and Conclusions of Law and being fully advised, IT IS HEREBY

ORDERED, ADJUDGED AND DECREED that the Adminstrative Order of the Commission for the Blind is hereby affirmed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this matter be dismissed with prejudice.

DONE IN OPEN COURT this 26th day of May, 1982.

MARCUS M. KELLY, Judge

APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 80-2-04706-4

LARRY WITTERS,

Petitioner-Appellant,

vs.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent.

JUDGE'S DECISION

VERBATIM REPORT OF PROCEEDINGS
Before Hon. Marcus M. Kelly

FOR THE PETITIONER:
Michael P. Farris
Attorney at Law
P.O. Box 1219
Olympia, Washington 98407

FOR THE RESPONDENT:

Ernest M. Furnia
Assistant Attorney General
DSHS - M.S. : PY-13
Olympia, Washington 98504

BE IT REMEMBERED that the above cause came regularly on for the trial on the 11th day of December, 1981, before the Hon. Marcus M. Kelly, Department 10, Spokane County, Washington, the petitioner and respondent appearing through their respective counsel, and the parties having announced they were ready to proceed, the following proceedings were had:

THE COURT: All right. I am quite sure counsel are aware, but because Mr. Witters is also present, I would like him to be aware that I have had possession of the record in this case. I did not just get it today. I have

had it for some time and I have had the benefit of both counsel's briefs and I thank both counsel for their briefs in this case. Again, I have had the file for some time and I have been through and studied the record on more than one occasion. I likewise have reviewed, considered and studied the briefs on more that one occasion. I have read some of the cases. I will not say I have read every case cited in the briefs. Specifically, so that you are aware, Mr. Witters, this is something the Court has had to consider. It is not a consideration or decision being made merely after hearing argument today.

The arguments , of course, advanced here today have been relatively close to those put forth in the trial briefs. If I were, of course, to decide this case basically upon feeling or sentiment

or sympathy, it would probably be no surprise to counsel that my sympathies or , what have you, would be to grant relief in this court. I am merely observing, having been a product of parochial schools and private schools with strong religious affiliation during all of my education. I cannot decide this case in that manner. I have had to decide it upon the facts. I do not really have to resolve any facts in this case. We have stipulated facts. I must start with those particular facts and, in effect, interweave them into the law, as I read the law and the law which has been argued to this particular Court. This field, counsel both probably know and maybe specifically, Mr. Farris, I don't know how often Mr. Furnia has been in this particular field, the separation of church and state is a tremendous field of litiga-

tion. All you have to do is look at the number of cases that have gone before our State Supreme Court and before the United States Supreme Court. It indicated that it presents issues that have been in litigation for years and years.

Some of the matters even touch upon, I can recall as a child, as I say, having attended parochial schools; in effect what was attempting to be done in some of the schools I have attended. I am a little older than the Weiss v. Bruno case, which was decided not that long ago.

I start initially with the fact that we do have a specific law we are dealing with here. That is contained in Chapter 74.16 of RCW. The purpose of that law, as I read it, is to basically assist, in various manners, people who are visually handicapped, to prepare

them in effect to become and to be selfsupporting. The law does grant certain authority or allow certain programs. I will state this, that the entire law is not too extensive. One of the objectives or purposes of the law is set forth specifically in 74.16.181, which is that portion that confronts this Court today; specifically subparagraph 3 which allows the Commission, which is created by this particular law, as a State Commission, to provide for special education or training in business, professions, or trade and provide the payment of some certain funds.

All right. This law does create the Commission for the Blind; does specify to a certain extent its make-up. While it does specify what its make-up is, I note among that among that make-up that a specific number of the persons

on the Commission must be, if I can use the term, legally qualified blind persons. I am aware that there is a refraction in sight that fits within the term of what may be legally blind. This law further, and specifically Section 74.16.450, empowers this Commission, through the director, to serve as the sole agency of the State in preparing, adopting and certifying State plans, rules and regulations for services for the blind and visually handicapped as set forth in this chapter and to seek federal funds for the same.

Now, it does empower them with certain other powers that do not appear to be at this point appropriate to this determination other than the right of review, which avenues have been followed bringing this case here today.

I start initially with the Commission

is empowered in effect to certify and adopt, plan and rule. Now, I am assuming that, pursuant to this particular authority, the Commission in this case did establish the policy statement that is stipulated in this case; the policy statement or that portion of the policy statement which is the subject matter of this present lawsuit. No question has been raised, at least I did not note in the argument here any question raised as to the authority of the Commission to establish policies or regulations. The question is, does that commission have the authority to establish this particular criteria in this particular case; this field, that is, the field of separation of church and state. I use that in very broad terms, talking about public funding and religious affiliation. Looking at and studying the cases by both

sides, both Supreme Courts, U.S. Supreme Court and our State Supreme Court there is a body of law where narrow, narrow lines seem to be constantly drawn. I agree with you, Mr. Farris. You cite the Blanton case, I believe, to clarify for you in trying to determine what yardstick the United States Supreme Court uses and saying this is okay, and that is not okay, it's difficult. The statute here, of course, is completely silent as to any constitutional limitations. I agree with Mr. Furnia that that is the general procedure. As a general rule you do not have the legislature attempting to determine in advance and provide in their own particular laws what is constitutional and what is unconstitutional. Because I have not been into it before, I am somewhat surprised to find the one reference, I believe, it was 28

B. I am not too sure of it. Specifically, that says these funds shall not be used. Now whether there was a bootstrapping arrangement, I don't know, but I was surprised to find that within the law. The fact is that no law, I don't think it can be argued against or gain said, in any manner exists in a vacuum, any law, whether it be as part of our State Constitution, the United States Constitution or our statutes. Enacted law must be read and must be considered within the whole fabric or framework of all the law that touches upon a particular area. In this particular case where we have public funds involved, and again there is no question that they are public funds, what effect the mixture of state and federal I think would have in this particular case, I am not making a determination. I

am saying we are talking about public funds. The fact that public funds are involved to me activates and brings into play the whole panoply of laws and constitutions that deal with public funds. As part of that law, as I say, are the cited cases from our Supreme Court. I am just using the two that have been argued, at least by the State in this case; the Weiss case in 82 Wn.2d and the Higher Education case in 84 Wn. 2d as examples. We have the two provisions in our State Constitution that play a role in this particular case, before I even address the Federal Constitution, and that is Article I, Section 11 of the State Constitution dealing with religious freedom, which on its language initially, I think is broader, even than the Federal Constitution. I think throughout, at least in my comparisons in various

areas where I have looked, our State Constitution and our Federal Constitution in some areas, has it broader that the Federal Constitution in some areas has it more restricted, The provision which concerns the Court today, Section 11 reads:

> "No public monies or property shall be appropriated for or applied to any religious worship, exercise or instruction or the support of any religious establishment..."

All in the disjunctive. I might point out argued orally, Mr. Farris, but I notice you did make some argument in your brief with reference to chaplains in our institutions. I am sure you are aware there is a specific exception in our State Constitution covering those and I would just point out in this same section, Section 11, just

to answer a question raised in the brief. It reads as follows:

"Provided, however; That this article shall not be construed as to forbid the employment by the State for chaplains for penal and mental institutions as in the discretion of the legislature may seem justified."

You did not raise it orally and I was ready to answer you rather rapidly in your brief, because I did find specific constitutional provisions. The other area of our State Constitution that this case involves inferentially or otherwise is Article IX, Section 4 which states:

"All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

I start with the proposition or understan-

ding in this case that the factual situations and the issues before the Court in the case of Weiss v. Bruno and somewhat in the case of Higher Education Assistance v. Gray, are not really factual akin to what we are looking at here today. If I can quote from the Wizard of Oz, this is a horse of a different color. We are not in this particular case attacking the statute, the statutory authority that sets up the Commission that allows the funds to be disbursed. We are in effect questioning the application or non-application of those funds by the Administrative Board or Administrative Agency. Of course, in these two cases, the two cases I am referring to, there was a specific law that required certain things to be done. Under that law, specifically in the Weiss case, it dealt both with the primary grades and with college education. The Higher Education, itself, on the other hand, concerned itself with

higher education, as the name indicated, on the college level. In the Weiss case, an agency, there is no question, the agency in applying that particular law geared to a specific group which turned out to be a group dealing with or having a uniform religious belief. I believe the Weiss v. Bruno case, the bulk of the funds that were to be disbursed in that particular case were geared at or received by the Roman Catholic faith. I feel that what I must do--these cases are relevant here in consideration the reasoning, the reasoning for the Court. Our State Supreme Court, in arriving at the various conclusions it did arrive at in these cases, and in other cases, the Weiss case talked about needy. Some of what we could substitute in this particular case, the term, "visually handicapped," for "needy."-

It raised the issue of whether or not the proposal or funding proposal which, I believe, in the grade school case was

to go directly to the recipient. I do note that Judge Brachtenbach who wrote the opinion had some difficulty in wanting to know how a six-year-old was going to endorse the warrant. My feeling as I approached the matter before me, is somewhat of Judge Brachtenbach's feeling. We are in an area talking about equities, about feelings and what have you. Some sympathy would be on a particular side. We are faced with certain laws. We are faced with certain well-established principles of law, principles of constitutional law. There was a contention in the Weiss case that the particular law which in that case granted funds. What I am saying, the Court's reasoning in this case, starting with Weiss, the reasoning in the case before it, contained every particular on the opposite side of the coin. In the Weiss case they took that the granting, that is , the disbursement of these particular funds violated the

establishment clause of the First Amendment of the Constitution, the United States Constitution. They also argued that it violated Article IX, Section 4 of our State Constitution which deals with schools in Article I, Section 11 of the State Constitution which is basically our religious freedom. The language from this Weiss case is something that the Court has considered when arguments are made with reference to the purpose, the laudatory effect, of the legislation before it. The Court in the Weiss case remarks at Page 205:

> "Neither recognition of the accomplishments of these schools nor appreciation of the laudable purpose of the statute can overcome the clear constitutional provisions which the members of this Court have sworn to uphold."

It then goes on and I think gives somewhat of an insight to our State Const-

itution. At Page 208,it discusses Article iX, Section 4, which again is dealing with funding of the schools, pointing out that it is far stricter than the more generalized provision of the First Amendment of the United States Constitution. It talks about our constitution, meaning our State Constitution. It specifically directs that no public funds be used or maintained to support any school which is under sectarian control or influence and talks about there is no such thing as diminished violation which was touched upon by Mr. Farris in his argument. It goes on to point out in that case that it is indisputable that the more restrictive clause was the deliberate design of the framers of our constitution, meaning our State Constitution, that required again the school system to be maintained free from sectarian control. Granted the Weiss case deals with the school system. They point out that there was an attempt to

strike the words,"or influence," in that particular session and it failed. In other words, it showed apparently the framers of our State Constitution; their frame of mind. This case also touches upon, though I could not obtain a stipulation here, the question of what we are talking about; aid, whether it be incidental, indirect or direct. It says that our State courts no longer make that particular distinction. It talks about how attempts have been made under the laws of this particular state, that is the State of Washington, dealing with bussing. I am talking about bussing to, not bussing from school to school, but providing free transportaion under the exercise of police powers to all pupils and how that was struck down; attempting to, in effect, I won't use the term, "circumvent," but to see if some neutral group or some ground could be established with the schools. There was an attempt to exercise

police power. This case points out that the police power, broad and extensive as it is, may not be exercised in circumvention of constitution inhibitions. The tenor apparently of the Washington Courts, I do not know, Mr. Farris, I do not presume to be that astute a student of the constitution, but I do not know whether it is correct or not that Washington is the only state at this time that will not permit the use of rehabilitation funds in any sort of religious education. I don't know, but the tenor of these cases certainly indicated the feelings of our State Supreme Court.

This case also talks about reading various constitutional provisions together. The Higher Education case again directs itself over and touches upon, as I recall, this case involved in effect allowing a governmental agency to obtain loans for students to pursue higher education. Our State Supreme

Court made very short shift of that. It made reference to Weiss v. Bruno; held that use of public funds directly or indirectly was unconstitutional and that they attempted to do here was a violation in this case. It makes mention both of Article IX, Section 4 of the State Constitution and Article I, Section 11 of the State Constitution. It is in this vein, I feel, the Court must review the issue that is before it.

I assume both counsel are probably aware, especially in the criminal field in this state, our State Supreme Court is more amd more looking to the State Constitution than the Federal. Whether there is going to be a clash, I don't know, but I cannot completely put these cases out of my mind in making any decision that I must make. Now, I will address myself initially to the argument of whether or not the Commission here is attempting, in effect, to say that this statute is

unconstitutional as it applies to Mr. Witters in this case.

Going back to the fact that a law cannot be construed in a vacuum, I do not think that the Commission could on the other hand blindly disburse these funds without paying any attention to certain constitutional and other statutory inhibitions.- Their action here, at least in my judgment, is not making some sort of constitutional determination or unconstitutional determination of the underlying law, but deals with the application of this particular law. I feel that the Commission is empowered to make rules, to make regulations, to establish plans. It in effect has the implied authority to make the plans or establish the plans they have and in so doing it cannot close its eyes to the restrictions that are placed upon the use of public funds. So I do not see their action in this case as attempting to declare the over-all or underlying law

unconstitutional in its application. I think it has a right to do so in its application. That doesn't answer the further question, but I think it has the right to do that. So I can easily see the distinction and find the argument of the State in this case more persuasive on that particular issue than the argument of the petitioner. I noted that the Weiss case does discuss in detail -- not the Blanton, that apparently was a case that was more recent that the Weiss case. It does discuss to a certain extent the Lemon v. Kurtzman case which is cited in counsel's brief. It is the case that I cannot recall, Counsel, right offhand without going through this rather lengthy opinion; it picks up, or I know, synthesizes the tripartite test that has been argued before me. I note there is discussion in that and I note apparently even our own State Supreme Court, even looking at some of those cases, have materially

held the way they have held and it would appear, in some cases arguably, in contravention of those holdings.

Counsel for the petitioner has raised in his argument what effect the ruling of this Court or any court might have on the over-all system or people in other schools. I feel, as I pointed out to the State, that the extent of my jurisdiction and my authority in this particular case is a decision of the case before me upon the facts that have been developed in this case and have been stipulated. I will leave, I think, I must leave, as a trial court, the far-reaching effect of any decision to one of our courts of review or our State Supreme Court.

One of the reasons I was interested and I did question Mr. Farris about any decisions in the case of the G.I. Bill. That apparently is an area as I understand it, Mr. Farris, that has existed and they have

just turned their backs on it and have not made any decision on it; is that correct?

MR. FARRIS: At least at the appellate--Federal Appellate level, that is correct. There may have been a trial court case. It brings to my mind that Madelyn Murray tried it once and wasn't successful at the appellate level. To my knowledge, no.

THE COURT: If there were some determination on that particular thing, the U.S. or a state supreme court case, it might have some affect here. As I say, I am aware. I obtained part of my schooling at Gonzaga on a G.I. Bill. There is another area and I don't know whether it was necessarily argued by counsel or if counsel asked the Court to pick it up. In the Weiss case, I am noting, and it is contained in the footnote on Page 206. That talks about possible qualification on the sleeping prohibition, as our State Supreme Court

says, of the Constitution, Article IX, Section 4, which concerns schools, would result from conflict with the free exercise clause of the First Amendment to the United States Constitution:

> "No question is raised here of infringement of any person's right to the free exercise of his faith. The question is not whether a student may attend a religious school, but whether the State may subsidize that attendance.No element of coercion has been suggested by the respondent's and the free exercise clause is not involved in these cases."

So at least that thought is in Weiss v. Bruno, and the thought must have been within our State Supreme Court's mind.

In reviewing my notes, gentlemen, because a number of issues have been raised, I think both parties have touched upon it. The Court knows what the law requires

about the Court participating in ruling about various constitutional issues before they are presented, or need to be ruled upon or going into particular constitutional issues that, in effect, might be a gratuitous ruling, depending on what your initial ruling is. I have had benefit of the effect of that in a case that I had several years ago on which I spent considerable time working on an opinion on various constitutional issues. Our Supreme Court picked on one and said we don't have to pay attention to the rest. It was an opinion I worked on for about three months but that's maybe--we shouldn't have that in the record--again, this is an example, but this case has given me concern. These cases do not necessarily fit. I have considered the various arguments. I am speaking of Federal cases specifically advanced by the petitioner in this case. If I turn around, I must contrast that with our State Constitution and what our State

Supreme Court says our Constitution says and what I would anticipate our State Supreme Court would say what our Constitution says in this particular case. To say that what the State did or the State Commisssion did in this particular case with reference to Mr. Witters was improper, I would, as pointed out by Mr. Farris, in effect have to rule that our State Constitution is unconstitutional. That puts the Court in another dilemmic situation. The upshot basically of all this ruminating on the Court's part or thinking out loud, is I think it is well established in this particular state how our court, our State Courts, have reviewed our State Constitution in certain areas. If religion is involved anywhere, or sectarianism, our courts have a tendency to hold it is violative, that is, when public funds become involved under the Constitution. I think, as I say, of the case where they attempted to allow

nonpublic students to ride on school buses. I can think of another case. I do not recall whether or not it proceeded beyond the trial court level. It was what was referred to as the release time cases. I don't know whether that is now essential in this particular state. People in public schools were seeking to have time release to attend religious exercise. Problems were encountered in that. Initially, as I say, I do not recall further than what the initial determination was, that it was improper. From my own standpoint, this particular case, at least apparently, or the case that was mentioned recently in the paper, allowing apparently, some sort of religious activity on state-funded campuses may be in effect a harbinger of this coming the other way. I don't know. I try to determine what is before me and not what is going to happen in the future.

It certainly appears to be, and I did note in that particular article, that

the primary cause, if as I read the article, the primary basis for that ruling was apparently freedom of speech and whether the court in that case completely sidestepped establishment or the establishment clause or the practice clause of the First Amendment is not known. Quite frankly, the conclusion that I am constrained to come to here and I use that term advisedly, constrained, is that the acts of the Commission here were correct. I have some concern in my own mind. One of the arguments, is it correct. I have considered the argument using the tripartite, especially the involvement in religion in this case. If we take that and work backwards, I am tempted--I hope counsel is following the Court's reasoning--I am taking basically a premise that says something and turning it around and going backwards. The one that talks about if the schools or governing body must become embroiled or enmeshed in making a determina-

tion. Here the position the Commission takes keeps them completely out of it. It just says this specific course we will not fund. To me starting and going back--am I being clear to counsel in my reasoning? Maybe I am not expressing myself, but this could be a pure noninvolvement situation by saying that we will not fund a theological rather than relying on my memory--well, in effect what they are saying is that we will not use public funds to assist an individual in the pursuit of a career or a degree in theology or related areas. To me, that is an extremely neutral position. I have wrestled in my own mind with what Mr. Farris has argued. Has it become neutral to the point that it is no longer neutral? In looking at the other side side of the coin, are we attempted to establish a religion of nonreligion? Mr. Farris, you have some intriguing arguments that have given this Court fits, for want of a better term.

The area that gives me the most concern is this case, is I do not see any conflict between what is done here and either the First Amendment of the United States Constitution, the establishment clause, the practice clause. The area that gives me concern is the equal protection. That gives this Court some concern.

Now, in reaching the conclusion, again, I feel I must make, in view--there is some slight reference to equal protection in the Weiss v. Bruno case. There is a very short shift referral. But I start initially in this case with a body of law that is dealing with a selected group of people to begin with; that is, people who are visually handicapped. It is a special enactment. The policy so far as those people are concerned, at least established by the Commission, would appear to be uniform to that particular group of people. The policy says that we will not use public funds for a degree

in theology or related fields.

Now, in my own mind I am trying to determine whether or not I am boxing myself in in making that determination. Within that specific field, the application is uniform. Granted, the result would be in this particular case to restrict, it would appear to me, anyone within that particular field from the pursuit of theological studies. But the fact that I have before me, that policy, and I have nothing to the contrary, apparently is enforced within this particular field, those of the visually handicapped. We will not fund those particular things. We cannot fund those things. I cannot, unless I am missing a point, Mr. Farris, I invite you to comment within that field--that is a uniform application of that particular policy. I do not see a denial of equal protection to that restricted group.

MR. FARRIS: Well, there are two things that I think the Court's ruling raises. One

is there an application-type discrimination. I would say there is not. Everybody who would have a vocational goal that would be pastoral or religious being treated the same. It is not being unfairly administered, but I think it is different. The equal protection clause requires more than that. It requires that the difference be based upon a purpose, that is founded upon the over-all purpose of the legislation. That is the part that we have argued as missing.

THE COURT: I see that argument. I see those distinctions. As I say, throughout your argument of counsel and in all these cases, the Court seems to be drawing extremely, extremely fine lines, but I feel that must be read in conjunction with the very same language. The language that has been extremely, strictly construed by our State Supreme Court deals with religion and religious affiliation. The tenor, at least in this state, seems to be public funds just are

not to become involved in anything that would smack or even hint of the practice of religion, the fostering of religious education. It is basically, I think, gentlemen, something that you and the Court finds itself with as a fact of life.

Now whether I had anticipated--I am not inviting either party--either way that I may have determined that the matter would go up maybe in this particular situation. Whether our State Supreme Court could see a distinction from what I envision, the programs as such that they have previously ruled on in this state, in this case I don't know. The purpose of the statute, as I say, is laudatory. Its effects, if it were, you know, carried out, and I assume they are being carried out, is laudatory. It does have the effect and, as I say, it was unfortunate that Mr. Witters wishes to pursue a theological degree or pastoral type of work which I find most commendable.

But as I read it, gentlemen, as I read these particular laws it does stop him from the use of these particular funds in pursuing that goal. As I say, it is a decision, whether it is any consolation to Mr. Witters, as an individual, I don't personally like to make, but as a judge I feel I must make in this case, in my judgment and my interpretation.

So I would ask, Mr. Furnia, if you would draw whatever Findings and Conclusions are necessary as affirming the decision of the Commission.

(Whereupon at 12:32 p.m. Court adjourned.)

APPENDIX E

STATE OF WASHINGTON

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

OFFICE OF HEARINGS

Docket No. 0480A-237

In re LARRY WITTERS,

Appellant.

DECISION AND ORDER ON PETITION FOR REVIEW

ISSUE

May the state Commission for the Blind provide financial assistance to an other ise eligible recipient for the purpose of enabling the recipient to enroll in a Bible school to prepare himself to become a pastor, missionary or Christian educator?

FINDINGS OF FACT

I.

The Appellant is eligible for services from the state Commission for the Blind. One of the services provided by the Commissiion is funding for eligble persons for training or education. The Appellant seeks funding to attend Inland Empire School of the Bible to pursue education and training to become a pastor, missionary or Christian educator.

II.

The Commission has refused to grant financial assistance for this purpose, citing a Washington State constitutional prohibition. The Appellant appealed from the Commission's denial, and an administrative hearing was convened. In his Initial Decision, the trial Examiner concluded that payment of funds for this purpose violated Article I, Section 11 of

the Washington State Constitution, affirming the action of the Commission. The Appellant has petititioned for review of the Initial Decision, alleging errors as follows:

> (1) Denying the Appellant funds because of a religious occupational goal is a denial of equal protection of the law because the distinction is not reasonably related to the purpose of the statutory aid.
>
> (2) RCW 74.16 does not purport to disqualify the Appellant and the Commission cannot usurp the power of the Legislature to make legislative determinations.
>
> (3) The State Constitution does not prohibit granting of aid for vocationally rehabilitative purposes even in church-related schools.
>
> (4) Even if the State Constitution is construed to deny aid, not only does such denial violate the 14th Amendment, it also violates the First Amendment's guarantee of free exercise of religion.

CONCLUSIONS OF LAW

I.

Article I, Section 11 of the Washington State Constitution provides in pertinent part:

> No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment...

It is clear on its face that this provision prohibits the type of aid sought by the Appellant. This provision exists to protect the principle of separation of church and state. It applies equally to all citizens, and is not in violation of the 14th Amendment of the United States Constitution.

The statutory aid alluded to by the Appellant in his first assignment of error apparently refers to RCW 74.16.181, which provides for services to assist visually handicapped persons

to overcome vocational handicaps and to obtain the mximum degree of self-support and self-care. That statute is subject to the restrictions of Article I, Section 11, of the state constitution, set forth above.

II.

In his second assignment of error, the Appellant contends that RCW 74.16 does not purport to disqualify the Appellant, and the Commission cannot usurp the power of the legislature to make legislative determinations. The main thrust of the Appellant's argument here is that the Commission is not empowered to apply criteria for eligibility beyond those mandated by the legislature. However, the language of RCW 74.16 is permissive rather than mandatory in nature. In addition, it is a well-recognized principle that where a statute is

capable of two possible constructions, one of which will render it constitutional and the other unconstitutional, the legislature will be presumed to have intended a meaning consistent with constitutionality. The Commission, in determining that funds could not be paid to the Appellant under the circumstances of this case, has adhered to that principle. The constitutionality of RCW 74.16 becomes an issue only when that statute is interpreted as the Appellant urges. It is well within the power of the Commission to apply RCW 74.16 in a manner consistent with the clear mandate of Article I, Section 11 of the state constitution.

The Appellant's third assignment of error is to the effect that the state constitution does not prohibit granting of aid for vocationally rehabilitative purposes even in church-related

schools. The Appellant notes that there are many students in the State of Washington attending church-related colleges receiving vocational rehabilitation funding, and contends that the constitutional provision relates only to instruction that is devotional in nature. The distinction is that the purpose of that aid is to advance secular rather than religious studies. The fact that vocational rehabilitation funding is available for secular studies at church-related schools has no relationship to the facts of the current case. It is clear, as discussed above, that the Commission is under a constitutional prohibition and cannot fund the course of studies undertaken by the Appellant here.

III.

The Appellant finally urges that even if the state constitution

is construed to deny aid, such denial violates the 14th Amendment and it also violates the First Amendment's guarantee of free exercise of religion. The Appellant's arguments concerning the 14th Amendment of the United States Constitution are discussed above and will not be discussed further here. The First Amendment to the United States Constitution guarantees free exercise of religion. It does not require that the state subsidize religious study.

DECISION AND ORDER

The Initial Decision entered in this matter is in all respects affirmed.

DATED at Olympia, Washington, this 3rd day of December, 1980.

MONTY FOSTER
Review Examiner

APPENDIX F

STATE OF WASHINGTON

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

OFFICE OF HEARINGS

Docket No. 0480A-237

In re LARRY WITTERS,

Appellant.

INITIAL DECISION

A hearing in the above-entitled matter was conducted by PAUL B. HUTTON, a duly qualified Hearings Examiner. The stipulated facts were agreed to by the Appellant's attorney, Michael P. Farris, and by the Respondent's attorney, Ernest M. Furnia, Assistant Attorney General, and in consideration of said facts and their respective written arguments and memorandum of

authorities, the Hearings Examiner makes the following:

ISSUE

May the State of Washington's Commission for the Blind provide financial assistance to an otherwise eligible recipient for the purpose of enabling the recipient to enroll in a Bible school to prepare himself to become a pastor, missionary or Christian educator?

FINDINGS OF FACT

I.

The Appellant is eligible for the state's Commission for the Blind services. One of the services provided by the Commission in [sic] funding to eligible persons so that they can be trained to engage in gainful employment and become self-supporting.

II.

The Appellant wants to enter

Inland Empire School of the Bible to pursue education and training to become a pastor, missionary or Christian educator. The Commission has refused to make a financial grant to Appellant for this purpose, citing a Washington State Constitutional prohibition.

III.

The Appellant claims the Commission's decision: (1) denies him the services and assistance he was entitled to under the provisions of the enabling legislation; (2) denies him equal protection of the laws under the 14th Amendment to the U.S. Constitution; and (3) denies him rights which are guaranteed under the U.S. Constitution even if prohibited by the State Constitution.

IV.

Article I, Section 11, of the Washington State Constitution states:

"... no public money or property shall be appropriated for or applied to any religious workshop, exercise or instruction, or the support of any religious establishment...."

Article IX, Section 4, states: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

V.

The Commission's financial grant of assistance to Appellant would, or could, be used for tuition, books and other school related fees to permit Appellant to obtain his career goals.

CONCLUSIONS OF LAW

I.

The Commission for the Blind delegated the authority to hear and decide their grievance to the Department of Social and Health Service, which

has jurisdiction to hear and decide the same pursuant to RCW 74.16.520 and Washington Administrative Code (WAC) 388-08-002.

II.

To provide financial assistance to Appellant to enable him to pay for his education at Inland Empire School of the Bible to pursue training or education of a religious character would be in contravention of Article I, Section 11 and Article IX, Section 4 of the Washington State Constitution.

III.

It must be assumed that the legislature intended its aid services to the blind to be constitutional. Recipients for the Commission's services may pursue occupational and educational goals that will reduce their dependence on the state. The career goals being sought by Appellant would, or could,

lead to gainful employment which might eliminate that dependence. But in light of the State Constitution's prohibition against the state directly or indirectly supporting a religion, that specific education and training sought by Appellant could not be funded by the Commission.

IV.

The Hearings Examiner notes but dismisses Appellant's U.S. Constitutional arguments since he does not have the authority or jurisdiction to hear and decide such cases.

DECISION

The decision by the State of Washington Commission of [sic] the Blind to refuse to fund Appellant's education and training at the Inland Empire School of the Bible, to enable him to become a pastor, missionary, or Christian education [sic], is affirmed.

DATED at Spokane, Washington, this 28th day of October, 1980.

PAUL B. HUTTON,

Hearings Examiner